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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

AND

UNIVERSITY OF MARYLAND,

Petitioners,

V.

JUAN CARLOS MORENO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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September 24, 1981

The Daily Record Co., Baltimore, MD 21202

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This brief is filed in response to the "Supplemental Brief for Respondents in Opposition," which purports to be authorized by Supreme Court Rule 22.6 as presenting to the Court "intervening matter[s] not available at the time of the party's last filing."[1] Unlike Respondents, the University of Maryland and its President, John S. Toll, do

[1] Filing of this Reply Brief is authorized by Rule 22.5.

not intend to use this brief as a device to reargue their case. Rather, they will focus on the students' unfounded assertion that this case lacks sufficient importance to warrant the issuance of a writ of certiorari.

ARGUMENT

THE SUBSTANTIAL IMPORTANCE OF THE ISSUES IN THIS PETITION IS EVIDENCED BY THE INTEREST OF AMICI, THE VIEWS OF COMMENTATORS AND THIS COURT'S PRIOR CONSIDERATION OF THE CASE.

Fourty-four states and the major national higher educational associations have asked this Court to review the decision of the Fourth Circuit upholding the invalidation of the University of Maryland's in-state tuition policy. Nevertheless, the student-respondents, apparently shocked by this genuine outpouring of interest, still desperately strive to minimize this concern by closing their eyes to most of the arguments made by Petitioners and Amici. They say the only issue is whether a single narrowly-defined subclass of nonimmigrants (G-4 aliens) can qualify for in-state benefits. And, thus, on the basis of a selective, self-contradictory and unscientific "survey" of only nine state universities, they inaccurately state that most public colleges and universities do not have an in-state policy that operates like that of the University of Maryland.

First, it is important to note that the assertion of Amici that most public colleges and universities effectively deny in-state benefits to nonimmigrants was not a new contention or, in the words of Rule 22.6, an "intervening matter." For at least four years, in practically every brief filed, including those in this Court, the University has compared its in-state policy to those of other institutions. In fact, four years ago, many of these same Amici made the same representation and the students voiced no disagreement.

The only evidence on the question below — an affidavit by a University director of undergraduate admissions which was uncontradicted — indicates that the University's policy conforms to that of the majority of public colleges and universitites. Appendix at 190, *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981).

Second, no one has ever contended that *all* public colleges and universities deny in-state status to G-4 aliens or nonimmigrants. Some states have joined as Amici in this case despite having policies that favor such classes. This does not brand their support as casual. Rather, it demonstrates how the constitutional issues in this case transcend the educational setting from which they arose. Contrary to Respondents' implications, the Amici in every respect do not share homogenous interests. Some joined as Amici out of concern over the dangers of the irrebuttable presumption doctrine. Others are obviously troubled by the lower court's broad extension of the "strict scrutiny" equal protection analysis to nonimmigrants and how this will impact on many state benefits and programs. There are those whose only interest is the case's impact on higher education. However, any one of these reasons is sufficient grounds to grant certiorari.

In fact, this Court obviously viewed this case as worthy of its attention the last time it was here. It is more so now because of the additional issues now in the case, particularly, the equal protection issue which has stirred the interest of commentators. *See, e.g.*, Note, The Equal Treatment of Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069 (1979); Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 Mich. L. Rev. 1092 (1977); and Rosberg, The Protection of Aliens from

Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275.[3]

[3] Respondents' attempt to transform the equal protection issue to a narrow one must fail. First, the lower court struck down the University's policy as applied to *all* nonimmigrants, not just those domiciled in Maryland. Second, its rationale for so doing applies equally to *any* category of nonimmigrants. Third, their suggestion that *Elkins v. Moreno*, 435 U.S. 647 (1978), stands for the proposition that certain categories of nonimmigrants can never be domiciled in a state ignores the essence of this Court's holding in that case. The Court ultimately left it to state courts to determine whether state law precluded the establishment of domicile for the category of nonimmigrants in question. And, it would appear that most state courts do not consider nonimmigrants' visa restrictions as barring the establishment of domicile. *See* Annot., What Constitutes Residence or Domicile Within State by Citizens of Another Country for Purpose of Jurisdiction in Divorce, 51 ALR 3d 223, 233-235 (1973). Thus, as Amici observed, "[i]t is no answer to say that the elusive concept of domicile will limit the numbers of nonimmigrants who can qualify" for in-state tuition if the lower court's decision is allowed to stand. *Brief of Alabama, et al.*, at 10. Finally, even if the class at issue for equal protection purposes can be limited as Respondents contend, there would nevertheless be large numbers of nonimmigrants qualifying for the benefits. *See Supplemental Brief for Respondents in Opposition* at 2.

CONCLUSION

Petitioners contend that the issues in this case are important. They affect many educational institutions and will impact on the constitutionality of many other state classificatcns. For these reasons and those stated in the Petition for Certiorari, the University and its President request that review be granted.

Respectfully submitted,

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